Filed 7/1/19 In re Kash P. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re KASH P. et al., Persons Coming Under the Juvenile Court Law.	
MERCED COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ESMERELDA G., Defendant and Appellant.	F078410 (Super. Ct. Nos. 18JP00103A, 18JP00103B) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Merced County. Donald J. Proietti, Judge.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and Jennifer Trimble, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Franson, J. and Peña, J.

Appellant Esmeralda G. (mother) appeals from the juvenile court's jurisdictional order finding her sons, Kash P. and Zavier P., Jr., are minors described by Welfare and Institutions Code,[1] section 300, subdivision (b)(1) and an order removing them from her custody. She contends there was insufficient evidence they were at a substantial risk of harm. We affirm.

PROCEDURAL AND FACTUAL SUMMARY

In August 2018, the Merced County Human Services Agency (agency) assisted in the removal of then eight-year-old Kash, seven-year-old Zavier and their 10-year-old cousin after sheriff's deputies served a search warrant for a marijuana grow on the property of mother's cousin, Alejandro, the 10-year-old's father. In searching the residence, the deputies found a butane "honey oil" lab, weapons and the three children. Alejandro told the deputies his son was in the house but refused to open the door, forcing the deputies to kick the door in. They also forced their way into the locked master bedroom where they found three assault rifles, a ballistic vest and a loaded shotgun. The children were in another locked bedroom, which they exited and were led outside. Mother arrived shortly after the deputies cleared and searched the residence. She and her sons lived on Alejandro's two-acre property in a trailer behind his house.

The deputies found approximately 20 pounds of processed ready-for-conversion marijuana on the property along with eight pounds of marijuana buds and three outdoor 12-foot marijuana plants. Remnants of a butane honey oil lab, including butane canisters, butane collection vessels, marijuana extraction tubes and other items used for the extraction of honey oil, were found in a hallway bathroom. Eight open butane cans were located throughout the living room, bedroom, kitchen and bathroom, all accessible to the children. According to one of the sergeants, butane is a highly explosive gas and only required a small amount to cause an explosion. He pointed out butane cans that were

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[1] Statutory references are to the Welfare and Institutions Code.

about 10 feet from an exposed water heater, explaining that an explosion in the home would have been fatal. One of the deputies located children's bath toys, toothbrushes and other items that led him to believe the children frequented the home. Social workers detected a heavy odor of marijuana in the home and observed marijuana debris strewn throughout.

The children were belligerent and refused to be interviewed by the social worker, stating mother instructed them not to talk. Later, at the visitation center, they said the "police destroyed the good marijuana. God made weed and it is not a big deal because it heals people."

Mother denied ever being in the home but admitted knowing about the marijuana grow in the back of the property. She said she did not allow the children to visit their cousin. She only allowed them in the residence on this occasion because she was going to the store. If she had known what was in the home, she would not have allowed them to be there. The cousin, however, said the children visited him often and played video games in his room. Mother later admitted being in the home but said she never saw anything of concern.

The children's father, Zavier P., Sr., (father), was incarcerated, serving a 40-year-to-life sentence for second degree murder.

The department took the children into protective custody and placed them with a relative in Solano County. The department filed a petition on their behalf, alleging under section 300, subdivision (b)(1) mother willfully or negligently endangered them by allowing them to visit Alejandro's home and thereby exposed them to weapons, butane cans and a marijuana grow. It further alleged under subdivision (b)(1) father was incarcerated and unavailable to protect them and provide them care or support pursuant to section 300, subdivision (g).

The juvenile court ordered the children detained pursuant to the petition and set a combined hearing on jurisdiction and disposition (combined hearing). The agency

recommended the juvenile court remove the children from mother's custody and provide her reunification services. As reasonable efforts it made to prevent removal, the agency cited the interviews it conducted with the parents to assess their strengths and needs and develop a case plan, its review of criminal histories and law enforcement records, consultations with relatives to develop a comprehensive family history and visits with the children to ensure their needs were being met. The agency recommended the court deny father reunification services because of father's felony conviction. (§ 361.5, subd. (b)(12).)

The juvenile court convened the combined hearing on October 30, 2018. By that time, mother had relocated to Solano County and the agency recommended the court transfer the case.

Mother testified she and Alejandro no longer lived on the property where the weapons and marijuana were found, and she did not live with Alejandro. She explained his property was completely fenced off by a tall wooden fence. To get to his property, she had to enter by a chain link gate that was locked when he was not home. Her trailer was approximately three car lengths from his house. The children could only go to the house with permission to see their cousin, but they had not gone there since midsummer because the cousin left. She and Alejandro had a tenant/landlord relationship, so she did not go to his house often. However, he was going through a divorce, so she was helping him clean and checking on him. She was in his house 10 minutes prior to the search to drop the children off. They entered the house from a back door leading to the kitchen and from there walked straight back to the cousin's bedroom. She did not see anything in the kitchen except some things Alejandro's wife had packed to take with her. She denied any knowledge of butane canisters, weapons or honey oil equipment and did not have a key to the master bedroom. She claimed the children returned to their trailer to use the bathroom instead of using the one in the house.

The juvenile court sustained the section 300, subdivisions (b)(1) and (g) allegations, ordered the children removed from mother's custody, ordered reunification services for her and denied services to the father. In ruling, the court found mother's testimony that she was unaware of the dangers in her cousin's home not credible. The court stated:

> "So the Agency decided that [mother] had been neglectful in allowing her children to be in her cousin's care in what everyone would agree is a dangerous situation, assault rifles, loaded shotgun, butane devices, which were open, that could theoretically explode and be a danger, a drug lab—make-shift drug lab.
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> "And [mother] says, 'I didn't know anything about it. My cousin's house. I worry about the guy. He's going through a divorce. Kids like to go over there and play PlayStation4. Didn't know about it.'
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> "The detention report suggests otherwise. The detention report that was filed in this case says on page two, 'Upon entering the residence, there was a heavy marijuana odor present.'
>
> "Not surprising. Twenty pounds of processed, ready-for-conversion marijuana was found. Eight pounds of marijuana buds found, in addition to the three outdoor, twelve-foot marijuana plants, which [mother] indicated she knew about and acknowledged that, but denies having knowledge of anything else.
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> "Not credible. Not believable. You walk into a place like that, with all that going on, red flags should have been going off all over the place. And to say 'it seemed fine to me' … it's not believable. There was too much going on in that house.
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> "I'm looking at the photographs. These things weren't sealed up in hermetically-sealed containers, … mother's red flag should have been out."

The court ordered the case transferred to Solano County and calendared a transfer-in hearing for November 2018.

DISCUSSION

I. Jurisdictional Findings

A. Justiciability

Mother contends the children's presence in Alejandro's house was an isolated incident and she was no longer living on Alejandro's property or anywhere around him. Therefore, the juvenile court could not find the children were at a substantial risk of suffering serious physical harm under section 300, subdivision (b)(1). Mother concedes this court is not required to consider whether the evidence supports a jurisdictional finding as to her since a single jurisdictional finding supported by substantial evidence is all that is required to support jurisdiction over a child. Nevertheless, she argues that we should exercise our discretion and review her contention on the merits. We opt to do so.

" 'When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.' " (*In re I.J.* (2013) 56 Cal.4th 766, 773, quoting *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

Since neither mother nor father challenged the allegations concerning father, which alone justify dependency jurisdiction over the children, we need not consider the sufficiency of the evidence to support the juvenile court's jurisdictional findings that are specifically adverse to mother. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 ["For jurisdictional purposes, it is irrelevant which parent created [the] circumstances" triggering jurisdiction]; see also *In re Briana V.* (2015) 236 Cal.App.4th 297, 308; *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 ["[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring [the minor] within one of the statutory definitions of a dependent."].)

A reviewing court, however, has discretion to consider the merits of a parent's appeal and often does so when the finding " '(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) "could have other consequences for [the appellant], beyond jurisdiction." ' " (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.) In this case, we choose to exercise our discretion and consider the merits of mother's appeal.

B. Section 300, subdivision (b)(1) (Failure to Protect)

Section 300, subdivision (b)(1), authorizes a juvenile court to exercise dependency jurisdiction over a child if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent … to adequately supervise or protect the child, … or by the inability of the parent … to provide regular care for the child due to the parent's … mental illness, developmental disability, or substance abuse." (§ 300, subd. (b)(1).) Where it is not alleged the child or children have already suffered serious physical harm or illness, the juvenile court must determine whether a substantial risk of the same exists at the time of the jurisdiction hearing. (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.) " 'In reviewing the jurisdictional findings …, we look to see if substantial evidence, contradicted or uncontradicted, support them.' " (*In re R.T.* (2017) 3 Cal.5th 622, 633.) We conclude such evidence exists on this record.

Despite mother's denials, obvious physical evidence of a marijuana cultivating enterprise in Alejandro's house with all the attendant dangers supported the juvenile court's conclusion mother was aware of the dangers and knowingly exposed the children to it. She also coached them on how to deal with authorities by instructing them not to say anything. They were also aware there were grades of marijuana, commenting that the deputies destroyed the "good" marijuana and were indoctrinated into believing that marijuana was "not a big deal." On that evidence, the juvenile court was justified in

concluding that this was not a one-time lapse in judgement on mother's part, which placed the children in the middle of a highly dangerous drug activity. Rather, it was a gross disregard for their safety that was likely to recur.

II. Removal Order

Mother challenges the juvenile court's removal order on two grounds: (1) there was insufficient evidence removal was the only reasonable way to protect the children and (2) there was insufficient evidence they would be at a substantial risk of harm if returned to her custody.

In order to remove a child from parental custody, the juvenile court must find by clear and convincing evidence there is or would be a substantial danger to the child's physical or emotional well-being if the child were returned home and there are no reasonable means by which the child's physical health can be protected short of removal. (§ 361, subd. (c)(1).) If the agency recommends removal of the child from the home, the agency's social study must include a discussion of the reasonable efforts made to prevent or eliminate removal. (See Cal. Rules of Court, rule 5.690(a)(1)(B)(i).) The juvenile court must "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home" and "shall state the facts on which the decision to remove the minor is based." (§ 361, subd. (e).) "[R]easonable efforts … need only be reasonable under the circumstances, not perfect." (*In re H.E.* (2008) 169 Cal.App.4th 710, 725.)

"The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103–1104.) "A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the

child." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735.)

On a challenge to the juvenile court's dispositional order, we review the evidence to determine whether substantial evidence supports it. We do so bearing in mind that the juvenile court's decision to order a child removed from parental custody must be supported by the heightened standard of clear and convincing evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) We conclude substantial evidence supports the juvenile court's removal order.

Mother posed a substantial danger to the children's safety because she knowingly placed them in a lethal environment. Though she denied this, the juvenile court did not find her credible. Mother's denial alone in the face of evidence she endangered the children was sufficient for the court to conclude mother was not likely to modify her behavior without court supervision. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.)

Mother, nevertheless, contends the agency did not sufficiently explore alternatives to removal, asserting the reasonable efforts it cited in its report pertained only to its investigation of the children's circumstances. Alternatives such as unannounced visits, public health nursing services and in-home counseling, she argues, were just a few of a myriad of services available to the agency to prevent the children's removal. Further, while the juvenile court expressly found there were no reasonable alternatives to prevent removal, she argues, it erred because it did not state its reasons for removing the children. We disagree.

The juvenile court stated it was removing the children from mother because she deliberately placed them in danger. Further, while it is true the agency did not identify efforts it made to prevent removal, the court could find returning the children to mother with services was not an alternative at that time because the case was in flux; it was being transferred to another jurisdiction to be managed by a different social services agency. In

effect, the court expressed this uncertainty, "I will certainly acknowledge that [mother] has moved away from that scene. I really don't know what the current living situation is. That's to be evaluated as we go forward."

DISPOSITION

The order is affirmed.